

CONSUMER PRODUCT SAFETY COMMISSION
16 CFR CHAPTER II

COMMENTS REGARDING THE RISKS
OF INJURY AND REGULATORY ALTERNATIVES
INVOLVING BUNK BEDS

In its notice of Thursday, January 22, 1998, the Consumer Product Safety Commission requested comments concerning the risks of injury and death associated with bunk beds, the regulatory alternatives discussed in their advance notice of proposed rule making (“ANPR”), other possible ways to address these risks, and the economic impacts of the various regulatory schemes, I am a second-year law student at the University of Tennessee College of Law. I am commenting on the risks of injury and death associated with bunk beds. Primarily, injuries and/or deaths from bunk beds result from inadequate mattress supports, entrapment between guardrails and the mattress, as well as entrapment between the mattress and the wall. More specifically, I will comment on new standards needed to address these issues, who should be made to comply with them, the extent to which they are feasible, and the type of regulatory model needed.

Risk of injury should be the primary consideration in promulgating rules concerning bunk beds. Ultimately, as with any piece of regulatory legislation, harm or the prevention of harm is the intended goal. This notice has outlined inadequate mattress supports, entrapment in the space

between the guardrails and the mattress, and entrapment between the bed and the wall, as the three main risks of injury posed by bunk beds. Each identified risk needs to be addressed separately when considering new legislation.

Inadequate mattress supports are one risk that can be avoided through simple measures. All mattresses, including those in bunk beds, require either metal or wooden slats whose primary purpose is to support mattresses and prevent their collapse. Requiring that bunk bed manufacturers use an additional wooden slat or choose wood whose density is greater than the wood currently used is feasible. Furthermore, bunk beds that rely on metal supports can be made more secure by making bunk bed manufacturers comply with greater metal per slat ratios or increase the total of metal supports per mattress. Modifications aimed directly at bunk bed manufacturers who are solely responsible for the bed's structural soundness will further reduce the risk of injury associated with inadequate mattress supports.

Reducing bunk bed injury resulting from entrapment is also feasible even though not as straightforward as those involving mattress supports. However, bunk bed manufacturing companies should once again bear the burden of reducing their risks since they are the main beneficiaries of bunk bed sales. Design departments of bunk bed manufacturing companies should be required to test and analyze the appropriate spacing between the guardrails and mattresses at which children are not capable of becoming entrapped. On the surface, if the current standard for determining the width of this space has caused injury and/or death, it suffices to say that the new design should involve reducing the space between the guardrails and the mattress.

Entrapment risks involving the space between the bed and the wall are quite different from

those associated with inadequate mattress supports and entrapment in the space between the guardrails and mattress. Reducing the risk of this type of entrapment that results from improper spacing between the bed and the wall should fall squarely on the shoulders of the consumer, not the manufacturer. The consumer, after purchasing the bunk bed from the manufacturer, determines where the bunk bed will be placed. More specifically, the consumer, while positioning the bed is directly responsible for determining how close should be to the wall and whether or not the space between the two is such as to prevent injury and/or death. Therefore, regulatory legislation aimed at reducing the risks of injury and/or death from this type of entrapment should be aimed strictly towards the consumer. The legislation can take either of two forms: preventing the placing of liability on manufacturers for any injury resulting from bed to wall entrapment or warning the consumer that reducing this type of risk is their responsibility in which the manufacturer will not share. Unlike, the other two risks of injury, informing the consumer of their liability with respect to bed to wall entrapment will only seek to reduce their risk if there is compliance. However, it is not feasible to compel consumers to officially accept this liability where there is no method by which their compliance to some standard can be measured or enforced.

I do not think risks of injury can be addressed adequately without considering regulatory schemes which are not aimed primarily at the risks themselves. In order to provide a comprehensive system that reduces bunk bed injury, this agency should consider requiring manufacturers to include warning labels, instruction booklets with a toll-free customer service number, and a designated age limit children must reach before being allowed to sleep in bunk beds. Each method would go one step further in reducing the risk of injury by making the bunk

bed consumer an informed purchaser.

Warning labels that clearly state the risks of bunk bed injury and/or death should be visible to the consumer. They should provide a comprehensive description of all risks associated with bunk beds as well as provide small, but detailed illustrations of correct/incorrect methods for to insure their safe use. This simple provision should add to the reduction of all risks of injury associated with bunk beds while being an inexpensive regulation to which manufacturers can comply easily.

Secondly, instruction booklets that outline proper things such as spacing from bed to wall and thorough and detailed assembly guidelines should be included in all bunk bed packaging. As a result, consumers will not be left in the dark or dependent upon their own judgment where the potential risks of injury are very real. Moreover, this agency should consider requiring that all manufacturers provide toll-free assistance to its customers, at least during business hours. If there is some uncertainty on the part of the consumer as to the bunk bed's assembly or use, consumers can readily obtain prompt and adequate information that will further reduce the risks of injury. This regulatory scheme may not be received as well as warning labels by bunk bed manufacturers because of their its expense. However, the slim increase in price can be offset to the consumer and make the toll-free number feasible.

Developing an age criteria for bunk bed use might further reduce the risks associated with bunk beds. This agency has found that an overwhelming majority (96 %) of entrapment victims were ages 3 years old and younger. That fact alone should give rise to a mandatory disclaimer by manufacturers that children 3 years old and younger should not occupy bunk beds. The logical rationale for having an age limit revolves around the correlation between a child's age

and size. The bigger the child is physically, the less likely they are to become entrapped in spaces between both guardrails and the mattress. Furthermore, a larger size child is less likely to get entrapped between the bed and the wall. Since the risks of injury associated with bunk beds are a majority result of entrapment, setting an age limit, to a large extent, would greatly reduce the overall number of bunk bed injuries and/or deaths.

All suggested methods for reducing the number of bunk bed injuries and/or deaths need mandatory regulatory schemes to work. Changing the structural composition of mattress supports will not further reduce risks unless manufacturers are required to comply with these new standards. Manufacturers will continue to use a lesser expensive method for building bunk beds, despite the evidence showing that currently used standards are unsafe. Furthermore, suggesting that design department who are in the position of devising a more appropriate spacing distance between the guardrails and mattress amounts to a mere suggestion with the lack of mandatory compliance. In order to encourage the implementation of a newer, safer spacing distance between the guardrails and the mattress, manufacturers must be compelled by law to address the potential risks. Bed to wall entrapment injuries ,that I feel are solely the responsibility of consumers, probably would not fall neatly into a mandatory regulatory scheme. Consumers, as a whole, do not belong to a particular industry as do bunk bed manufacturers. Therefore, the lack of organization makes it harder to measure any compliance or implement any enforcement mechanisms. However, the unfeasibleness of making consumers comply with appropriate bed to wall spacing does not make it unfeasible for bunk bed manufacturers to escape liability for nay risks of injury and/or death which may result.

I will now address mandatory compliance as it relates to warning labels, instruction booklets

and age criteria. Each one of these methods should become an obligation placed on manufacturers. This burden may not be a welcomed expense by manufacturers. However, if implemented, each would work in conjunction with existing methods to further reduce the risks of injury. If there were even a detectable reduction in risks of injury and/or death with little overall expense to the manufacturer, mandatory compliance should exist.

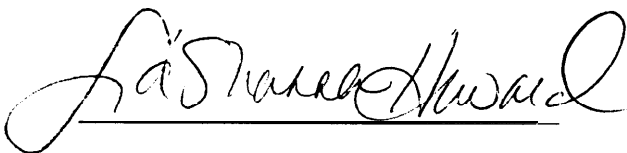
The economic impact of regulation has been touched on sporadically throughout my comments. Expenses involved in requiring denser slats to provide greater mattress support should not equal a substantial increase in costs to the manufacturer. Design departments who begin to analyze data regarding a safer distance between guardrails and mattresses can incorporate this new project into their everyday operations. Designing more effective, efficient and safer construction for bunk beds is their business. I failed to see the need for any additional expenditures to accomplish this scheme and prevent entrapment injuries. Furthermore, informing consumers that they will be liable for their lack of care in positioning bunk beds next to walls should stir little economic impact, if any. The only financial consideration I can foresee is dealing with the small number of consumers who will be inclined to complain to the agency about being held liable for the risks they cause.

The economic impact of requiring manufacturers to develop warning labels, instruction booklets, and age limits is less than the other regulatory methods. However, economic impact might still occur. Manufacturers will have to determine what are the most important hazards of which consumers should be warned. This flurry of ideas may involve hiring experts who are more capable than bunk bed manufacturers at determining the rationale and understanding of the average bunk bed consumer. Experts might also be warranted to determine the average age at

which a child is physically developed enough to avoid being entrapped. However, these are all one-time costs that can easily be offset to consumers over a long period. Therefore, the overall economic impact should be minuscule.

The greatest economic impact would result from implementing mandatory compliance standards developed for bunk bed manufacturers. There is the initial overhaul of existing manufacturing methods, processes, raw materials, etc. Furthermore, there are additional costs to be considered involved in developing a mandatory standard, measuring compliance and enforcing it. However, in my opinion, these are all still one-time expenditures that can be recouped by bunk bed manufacturers through price offsets to consumers over the long-term.

In sum, mandatory standards are needed in the bunk bed manufacturing industry to insure compliance and further reduce the risks of injury and/or death associated with bunk beds. The costs placed on manufacturers pale in comparison to the further reduction of risks of injury and/or death by bunk bed consumers. Since the agency's and society as a whole professes the goal of wanting to insure safer products for consumers, it is necessary for manufacturers to comply with those standards that will better insure safety and reduce the risk of harm. With very little financial expenditure, the bunk bed manufacturing industry should be able to implement these safer standards for their consumers.

A handwritten signature in black ink, reading "LaShanna Howard". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

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COMMENT REGARDING THE PROMULGATION
OF MANDATORY SAFETY REGULATIONS FOR BUNK BEDS

I. Introduction

This comment will address the Consumer Product Safety Commission's proposal to promulgate mandatory safety standards for bunk beds. While I doubt any regulatory scheme will totally eliminate deaths in bunk beds, a mandatory rule will reduce fatalities and will provide several tangential benefits. It will increase notification of safety requirements for parents and manufacturers, it will level the industry playing field, and it will increase compliance by small-scale manufacturers. Those advantages, when weighed against the incidental burden placed on manufacturers by the mandatory standard, favor promulgation of the new rules.

II. Statutory authority

The first, and most significant, question is whether the CPSC has statutory authority to pass mandatory bunk bed regulations when adequate voluntary regulations already exist. I believe the current regulations fail the second prong of 15 U.S.C. § 1262(2)(A), and perhaps the first, giving the CPSC statutory authority to proceed with mandatory rules.

The second prong requires “substantial compliance” with the voluntary regulations to preclude promulgation of mandatory rules. Conflicting information appears in the ANPR, and I am not sure of the level of compliance in the industry. The CPSC estimates the compliance rate at 90 percent. Commissioner Gall, in her statement accompanying her vote against proposing this rule, said the CPSC is unable to identify “even one manufacturer, distributor, or retailer

known to be out of compliance with the voluntary standard[.]” And the ANPR said that all 106 known manufacturers complied with the voluntary rules. Yet 500,000 noncomplying bunk beds have been recalled since 1994. If all known manufacturers are in compliance, who is making 125,000 nonconforming beds every year? According to data in the ANPR, 500,000 bunk beds are sold annually, which means that nonconforming beds comprise 25 percent of the market, all of which are made by these phantom manufacturers. If those numbers are even remotely close to accurate, the voluntary rules surely fail the “substantial compliance” test.

The first prong of the test calls for “elimination or adequate reduction of. . . risk of injury” if the voluntary rule is followed. 15 U.S.C. § 122 (2)(A)(ii). The CPSC identified at least three occasions in which deaths occurred in conforming beds. Although this is a low number and may be interpreted as “adequate reduction,” it certainly is not “elimination”: three deaths represents 3.5 percent of all bunk bed deaths over the last eight years. And if compliance has resulted in “adequate reduction,” why have the numbers of entrapment deaths held steady between 5 and 10 for the last eight years? Perhaps the voluntary rules have not been followed as steadily or been as successfully as Commissioner Gall might lead us to believe, and mandatory rules, for the reasons outlined below, may be more effective.

III. Notification ~ Manufacturers

The strongest argument I have heard for imposing a mandatory standard is that manufacturers will be better informed of their obligations. I suspect that the largest group of noncomplying manufacturers are small-time builders who are unaware that the voluntary regulations exist. A mandatory scheme that would generate more publicity of the safety requirements would have enormous benefits. This notification will come in several ways. First, a new regulation will generate publicity throughout the bunk bed industry in ways a voluntary

scheme could not. Information would likely trickle down to lower-level manufacturers, increasing awareness throughout the industry. Second, as sanctions are imposed on noncomplying manufacturers, attention will be brought to the new scheme that will encourage compliance. Third, if noncomplying imported beds are stopped in customs, awareness of the standards would reach overseas and increase compliance by foreign manufacturers. Fourth, and perhaps most important, once word spreads that manufacturers are exposed to civil liability for building noncomplying bunk beds, the entire industry will be more proactive in learning the regulations, as will their liability insurance carriers.

Unfortunately, even these publicity tools still may not reach the people least likely to know the regulations – the fly-by-night builders who construct bunk beds individually. There may be no way to dispense information to such a group short of lawsuits on a case-by-case basis. But if every significant manufacturer can be introduced to the new rules through the methods mentioned above, the mandatory scheme will have served its purpose in increasing compliance with the safety standards. Industry representatives argue that it is unfair to regulate all manufacturers because a small group are unknowingly producing the dangerous beds. But as I will discuss below, the burden on complying manufacturers is minuscule, and if more manufacturers can be informed of their safety responsibilities, the industry's burden is far outweighed.

IV. Notification ~ Parents

The strongest argument against promulgation of mandatory rules is that responsibility for these deaths lies with irresponsible parents rather than with noncomplying manufacturers. The numbers tell the tale: 57 out of 58 deaths from entrapment were children under the age of 4. It is easy to point the finger at a parent who puts a two-year-old child in a top bunk, but is it really

fair? A parent's first concern about a bunk bed is falling, and the data reflects this concern: there have been only eight falling deaths in eight years, and none since 1995. But would a parent understand the danger of entrapment? It is hardly ignorant for a parent to fail to see that the space between a mattress and a sideboard or the space under a guard rail could kill their child. That is why this mandatory rule is beneficial – it places the burden on the manufacturer, which knows the dangers of its products, to build a safer bunk bed. And it shifts that burden away from a parent who would not automatically see the danger in a noncomplying bed.

The mandatory rule will inform parents in a second way – increased warning labels. While labels are included on many beds, there is no requirement. A simple warning label could serve to alert parents that small children should not be in the top bunk, that the beds should not be altered, and that the gaps around the mattresses and under the guard rails should be filled. Parents could receive that vital information at virtually no cost to the manufacturer.

v. **Cost-benefit analysis**

While no one would ever want to place a dollar value on the lives of children, a balance must struck between reducing fatalities and regulating companies out of business. In this situation, although the number of lives saved may be fairly small, it still greatly outweighs the burden placed upon the bunk bed industry. Over the past eight years, 82 children have died from noncomplying bunk beds (85 total deaths minus three who died in complying beds). Although the ANPR quantified those deaths with dollar figures, I will leave that death toll to stand on its own merits. That is 10 children a year, a number that hardly shocks the conscience at first glance.

But the burden on the industry is virtually nothing. Manufacturers decrying the mandatory rule claim an additional cost of \$15-\$40, to be passed along to the consumer. This

makes no sense to me, since every manufacturer is already complying with the voluntary standard. According to the ANPR, the tally is 106 out of 106. The phantom manufacturers, those who make the 125,000 nonconforming beds per year, are the only members of the industry who can claim an additional financial burden. And that is a burden they should have dealt with long ago. If they were complying with the voluntary standard, they would have no additional cost and they would be relieved of the burden of having their beds recalled, presumably a significant financial burden itself. Commissioner Gall argued that the recall procedures were adequate, but it seems senseless to continue to round up noncomplying beds without working toward eliminating their production.

Basically the industry should be categorized into two groups – those complying and those noncomplying with the voluntary standard. If a manufacturer falls into the first category, it should have no reason to complain about the mandatory standard because it does not affect its product. Those manufacturers that fall into the second category are exactly the ones that this rule is targeting – those “mom n’ pop” operations that build the noncomplying beds that have killed 82 children, either out of ignorance or greed. I see no problem with regulating this industry to increase the likelihood that those noncomplying manufacturers will follow the rules everyone else already follows, and I see no burden on this industry that could possibly outweigh the loss of 10 children a year, not to mention the thousands more who are injured. In fact, I find it shameful that groups would oppose this rule just to fight regulation for fighting’s sake, because there is no substantive reason to oppose it. Is this industry really so callous that it will let children continue to be killed and injured to save the cost of additional piece on the guardrail? Of course not, which is why virtually all manufacturers are complying. This rule should go virtually

unopposed. Someone is making the beds that kill 10 children a year, and the CPSC should have no reservations about working to find them and stop them.

Although I understand that no industry welcomes government regulation and its accompanying complications, I fail to see from an economic standpoint why any of the 106 known bunk bed manufacturers would complain about this new rule. As I said above, if they're already complying, it poses no additional burden. Yet at the same time, the rule works to stop small-time manufacturers from making cheaper, noncomplying beds that undercut the major manufacturers. If this rule levels the playing field by forcing everyone to incur the \$15-\$40 burden and imposing sanctions on those who do not, the manufacturers are benefiting as well as the consumers. Manufacturers will also argue that enforcement procedures for this new rule would be expensive and time-consuming. I disagree, and point to the manufacturers themselves for the reason. This is a self-policing regulation. If a manufacturer discovers that someone in the marketplace is building a noncomplying bed at a cheaper cost, the complying manufacturer is naturally going to blow the whistle. The CPSC will need to do very little to discover noncomplying manufacturers – they will be flushed out by the competition. Moreover, requiring manufacturers to identify themselves will make it easier for competitors and the CPSC to discover noncomplying manufacturers, further reducing the administrative costs of this rule.

VI. Conclusion

This proposed rule is significant to me because I, like most children, slept in bunk beds growing up. From age 8 to 11 I slept in a top bunk, and did every imaginable thing to injure myself or my younger brother -jumping or flipping off the top bunk, wedging him between the bed and the wall, and climbing around the bed like it was a jungle gym. It is difficult for me to conceive that so many children are being injured on bunk beds when I tried so hard to injure

myself and failed. But it is also a powerful statement to me that 10 children are dying annually in these beds.

The CPSC will surely receive comments from industry representatives opposing this new rule, and they will be arguing that the mandatory rule is unnecessary for two main reasons. First, this is the fault of irresponsible parents and not an irresponsible industry. Second, those manufacturers who build noncomplying beds do so out of ignorance of the voluntary rule, not indifference toward the harm caused to children. Those points are probably both true. But the CPSC can work toward solving those problems in its new rule.

First, it can incorporate some notification scheme to publicize this rule to as many manufacturers as possible. This can be accomplished through trade journals, the internet, and furniture distributors. Total awareness obviously cannot happen overnight, but any successful rule must be known by the manufacturers and this should be the agency's biggest goal. Second, any promulgated rule should require warning labels to be affixed to all bunk beds. It seems crazy to me, but some parents simply may not recognize the dangers of putting a small child in a top bunk, and they certainly might not recognize the dangers posed by entrapment. Parents should be warned that children under 6 should not be in a top bunk, that guard rails should stay on the bed and reach down to the sideboard, and that there should never be a sizeable gap between the mattress and the sideboard. The cost to manufacturers is negligible, and at least parents would have the knowledge they need to protect their children, although requiring them to follow it exceeds the reach of any government regulation.

The most important thing to remember when considering this rule, however, is that there is no new burden on manufacturers. Even the slightest benefit outweighs the costs of this new regulation, because every significant manufacturer is already in compliance. This rule will serve

only to provide the CPSC with the regulatory ammunition to seek out and stop those fringe manufacturers which are producing noncomplying beds, which is a benefit to everyone.

Respectfully submitted,

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ANPR for Bunk Beds

Citation: Notice of Proposed Rulemaking, 63 Fed. Reg. 3280 (January 22, 1998)

Comment by: Taylor Bradford Mayes, third year student, University of Tennessee, College of Law

Date: March 30, 1998

Agency: Consumer Product Safety Commission

Summary: The CPSC's proposal is unjustified in that it will punish conforming manufacturers without addressing the real problem of small, unaware businesses; it will have a chilling effect on what has proven to be an expanding voluntary standard which enjoys the participation of the bulk of the industry; it ignores the remedies provided by products liability law; and it fails to satisfy the requisite burden for a mandatory standard when a voluntary standard already exists.

Introduction

In its notice of proposed rulemaking, the Consumer Product Safety Commission(hereinafter "CPSC")s elicits comments concerning its proposal to require a mandatory performance, labeling, or instructions standard for bunk beds because of the risk of entrapment to bunk bed users. Notice: of Proposed Rulemaking, 60 Fed. Reg. 3280, *3284 (January 22, 1998). At this time, only a voluntary ASTM standard exists. In its latest form, the ASTM standard addresses entrapment in the upper and lower bunk structures, the security of the foundation support system, potential collapsing of tubular metal bunk beds, warning labels that include mattress size information, instructions accompanying the beds, and the name and address of the manufacturer, distributor, or seller of the bed. Id. at *328 1. This comment concludes that the voluntary standard, given its growth and revision in response to any hazards related to bunk beds over the years, is sufficient in the current context which is marked by inconclusive evidence that a mandatory standard would alleviate entrapment problems in bunk beds. Additionally,

while the CPSC's concern for accidental deaths involving bunk beds is noble, it appears to be misplaced in that the CPSC has not met its requisite burden to propose a mandatory standard. That is, the CPSC has not shown the existing voluntary standard to be inadequate nor has it properly found that substantial compliance with the voluntary standard to be unlikely. While some evidence of both requirements is presented in the notice for proposed rulemaking, the general effect of the proposed rule would be to condemn manufacturers who are complying with the voluntary standard and who have exhibited a willingness to revise and expand the voluntary standard without addressing the crucial problem which appears to be the unawareness or carelessness of small, short-lived bunk bed producers who make beds that fail to satisfy the voluntary standard. A mandatory standard might help to notify these smaller businesses but would unduly burden the majority of an innocent and cooperative bunk bed industry. Essentially, a mandatory standard for bunk beds would sweep too broadly while continued revision of the voluntary standard, concentrated efforts to identify any actual problems with the beds, and the existence of products liability litigation would be more beneficial to all of the parties involved, buyers and sellers alike.

The Bunk Bed Industry Is Hardly Ignoring the Problems

Beginning in 1978 with the Bunk Bed Safety Guidelines, the voluntary standard for bunk beds has evolved into a workable standard. Behind the efforts of the American Furniture Manufacturer's Association(hereinafter "AMFA") and an Inter-Industry Bunk Bed Safety Task Group(hereinafter "IIBBC"), the standard has responded to the risks of injury posed by bunk beds by revising and expanding the voluntary standard. According to the notice for proposed rulemaking, AMFA members or ASTM subcommittee members comprise close to 80 percent of

the annual bunk bed market. Id. at *3282. In other words, the bulk of the bunk bed industry is not only aware of the voluntary standard, but complies with the standard in an effort to make bunk beds safer.

Intermittent voluntary recalls of bunk beds by manufacturers is another example of the industry's awareness of potential problems with bunk beds. Even without a mandatory standard that might require manufacturers to recall their products, bunk bed manufacturers have recalled their products and will continue to do so, maybe not out of the goodness of their own heart, but out of fear of products liability litigation. The voluntary standard seems to act almost as a mandatory standard in that the bulk of the industry approaches the production of bunk beds with great care. The CPSC is contemplating intervention without considering the deleterious effects such intrusion might have on the manufacturers as well as the consumers.

Chilling: Effect of a Mandator-v Standard for Bunk Beds

Imposing a mandatory standard for bunk bed manufacturers will take away the incentive for manufacturers to produce safer beds. A mandatory standard requires manufacturers to make products according to certain specifications or to suffer punitive consequences. While such action might cause smaller businesses to comply with the standard, it removes the incentive for the majority of the bunk bed industry that is already in compliance to continue to look for ways to make their products safer. These larger manufacturers will not only cease improvement efforts, but will attempt to shield themselves from products liability by using compliance with the mandatory standard as a defense. Plaintiffs will have a larger burden with a mandatory standard because they will have to prove that while the defendants did all that was required of them in the production of their bunk beds, defendants are still liable. Plaintiffs will have to show

that the mandatory standard is inadequate or in fact, mandates a defective design, and this is an incredibly difficult burden to meet.

Under the current voluntary standard, plaintiffs have a lesser burden, and defendants have an incentive to constantly try to improve their product. Present plaintiffs have to prove, at most, a defective design, but can often impose strict liability in a products action against the manufacturer. With each successful plaintiff, bunk bed manufacturers must reexamine their product to avoid future liability. Manufacturers cannot hide behind a mandatory standard, but can use compliance with the voluntary standard as evidence of a safe product. The current system encourages manufacturers to comply with the voluntary standard, and at the same time, encourages the industry itself to make sure the voluntary standard sufficiently addresses the possible risks. This kind of interaction between consumer and manufacturer is healthier than the potentially stagnant effect of the proposed rule. In an effort to prevent smaller businesses from producing dangerous bunk beds, the CPSC's proposed rule may eliminate accountability in the bunk bed industry.

The Real Problem--Small Businesses

While the notice of proposed rulemaking uses conclusory statements regarding noncompliance and inadequate reduction of risks to justify the imposition of a mandatory standard, a close reading of the notice highlights the real problem. Repeatedly, the notice refers to the problem of small, unaware businesses that enter the industry and create substandard beds. In discussing the problem of noncompliance, the CPSC states, "Because of the relative ease of constructing bunk beds, many small companies are formed each year. These may quickly go in and out of the business of making bunk beds. These companies are normally not associated with

industry organizations, and are often unaware of the voluntary standard or misinterpret its requirements.” Id. at *3282. The CPSC reiterates this problem when discussing the need for a mandatory standard, “. . . small regional manufacturers that periodically enter the marketplace may not be aware of the voluntary standard, or the hazards that are associated with bunk beds.” Id. at *3283. So, the problem is that small businesses don’t comply with the voluntary standard.

Assuming this is the problem, the next issue is whether such nonconformance by small businesses meets the standard of substantial noncompliance, so as to allow the CPSC to propose a mandatory rule. The notice itself states that it does not. In discussing the current market for bunk beds, the CPSC discusses the AMFA and ASTM members as comprising the bulk of the market (75-80 percent), and adds, “While there are likely many other small regional manufacturers or importers of bunk beds in addition to the 106 identified firms, *these are not likely to account for a significant share of the market.*” Id. at *3282 (emphasis added). How can noncompliance by an insignificant share of the market be construed as substantial noncompliance, especially in light of the CPSC’s own statement that all 106 manufacturers of bunk beds produce conforming beds. Id. at *3283. The CPSC’s proposal is based on 106 identified, admittedly conforming manufacturers, while its justification for the proposal relies on speculation as to the activities of unidentified, presumably nonconforming bunk bed businesses. As a result, the CPSC has not satisfied either of the requirements that would allow for imposing a mandatory standard on bunk beds.’ Having identified the problem being small nonconforming

‘The Commission[CPSC] may not issue a standard under either the CPSA or the FHSA if industry has adopted and implemented a voluntary standard to address the risk, unless the Commission finds that (1) compliance with such voluntary standard is not likely to result in the elimination or adequate reduction of such risk of injury; or (2) it is unlikely that there will be substantial compliance with such voluntary standard. Id. at *3284.

businesses, CPSC should limit the scope of their proposal to more directly address the problem, rather than impose an undue burden on the larger businesses.

A Close Look at the Proposed Reasons for a Mandatory Standard

The CPSC provides a list of reasons for its proposed mandatory standard in the notice. A close look at these reasons proves that the entire notice applies to smaller businesses. Increasing awareness regarding compliance, seeking penalties for violations, and receiving the assistance of state and local officials(reasons 1-3) all apply to the problem of small businesses because the bulk of the bunk bed industry is not unaware of the voluntary standard nor is it in violation of the standard. Id. at *3283. Violation of the law by retailers and distributors in selling nonconforming beds relates to nonconforming beds that come from small businesses because the majority of the market makes conforming beds. Id. at *3283. The notion that there exists a competitive advantage for manufacturers that produce nonconforming beds is an illusory reason for a mandatory standard. These manufacturers are subject to the same products liability laws as other manufacturers, and producing dangerous beds will certainly act to put them out of business quickly. The phrase “competitive cost advantage for [producing] unsafe beds” is inherently contradictory. Id. at *3283. A mandatory standard would allow U.S. Customs to stop hazardous beds at the docks, however the CPSC has not supplied any information that importing bunk beds is a substantial problem. The low recall effectiveness rate has been addressed by the voluntary standard which requires the name of the manufacturer on the bed, and if additional regulation is required in this area, it can be handled within the voluntary standard. The last reason proposed relates to the unexplainable three deaths which occurred on conforming beds, but this can hardly be seen as a significant problem. Weird accidents can occur no matter how stringent a standards exists, and three deaths over the course of several years and millions of bunk beds is doesn’t call

for a mandatory standard without more support. The reasons in the notice simply don't satisfy CPSC's burden when a workable voluntary standard is in place.

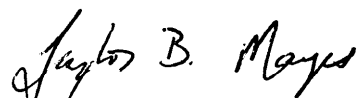
Possible Alternatives to a Mandator-v Standard

(1) If you examine the injury statistics involving bunk beds, it is clear that these type of beds may not be appropriate for children age 3 and under. Over 95 percent of the injuries have involved children of this age group. Perhaps, the voluntary standard should address this in the form of a warning label on the product to parents on notice that young children are at a greater risk. The majority of manufacturers would most likely be happy to comply with an expanded voluntary standard and could do so at a relatively low cost. Also, common sense should dictate that young children do not need to be sleeping suspended in the air if they are not old enough to appreciate their situation. Parents need to be held at least partly accountable for their judgment regarding the safety of their children.

(2) Rely on products liability law to keep the products safe. We do this in many other areas of industry without imposing mandatory standards. Businesses want to be profitable, and producing and selling unsafe products is not beneficial to this purpose.

(3) Realize that bunk beds do serve a beneficial purpose for families. Families that have more than one child may not, without bunk beds, have enough room to live comfortably. Bunk beds save space, without sacrificing comfort. Also, bunk beds are cheaper than buying separate beds for each family member. These are important benefits for many families and should be recognized by the CPSC in addressing this problem. The CPSC should focus on keeping the cost of bunk beds down and identifying the true culprits and attempting to regulating them without affecting the conforming manufacturers.

Respectfully submitted,

A handwritten signature in black ink that reads "Taylor B. Mayes". The signature is written in a cursive style with a large, stylized 'T' and 'M'.

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BEFORE THE CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

Docket No. 98-1457

COMMENT REGARDING THE PROPOSED MANDATORY SAFETY
STANDARDS FOR BUNK BEDS

This comment addresses mandatory safety standards proposed by the Consumer Product Safety Commission (CPSC) for bunk beds. The proposed rulemaking specifically addresses the hazard of entrapment, which has resulted in the deaths of 54 children since 1990. The current safety standard for bunk beds, ASTM F1427, is a voluntary standard that requires all spaces between the guardrail and bed frame and all spaces in the head and foot boards on the top bunk to be less than 3.5 inches. The standard also requires guardrails on both sides of the top bunk. The American Furniture Manufacturers Association argues that because the percentage of compliance with the current standard approaches 90 percent, a mandatory standard is unnecessary and excessive.

I agree with the proposal that the reasons for mandating safety standards for bunk beds are persuasive; after all, its purpose is to prevent the senseless deaths of children. Without more empirical data demonstrating the costs of

mandatory compliance, it is difficult for me to avoid the conclusion that any burden caused by the mandatory standard is incidental. Although 90% of current manufacturers conform to the voluntary standard, I argue that the 90% standard is not “adequate,” especially when faced with the probability that the biggest reason for noncompliance is lack of awareness of the voluntary standard. If this is true, any real burden caused by the mandatory standard would be incurred by the “mystery” manufacturers responsible for the 500,000 bunk beds that have been recalled since 1994.

I firmly believe that the mandatory standard should be implemented. The opposing argument, which focuses on the inability of the commission to justify mandatory compliance because the voluntary standard has “worked,” effectively glosses over the “two-prong test” of determining the effectiveness of a voluntary standard set forth in 15 U.S.C. § 1262.¹ This test asks whether the standard is substantively effective and whether it will be followed. Regarding the first prong, although the current voluntary standard improves the safety of the beds, companies are not required to comply with it. The CPSC staff is aware of 106 bunk bed manufacturers, and according to their information, all 106 of these companies are producing beds that are in compliance with the voluntary standard. This data appears to support the effectiveness of the

¹ BNA Product Liability Daily, *Safety Commission General Counsel Sees No Legal Impediment to Bunk Bed Standard*, Jan. 13, 1998.

voluntary standard, but it ignores those 500,000 beds that have been recalled over the past four years.

CPSC acknowledges that the real problem here is with small, regional manufacturers who are not active members of the industry and are probably unaware of the voluntary standard. Because the 106 known manufacturers are already in compliance, it is difficult to understand why they would disagree with this proposed regulation. The publicity that would result from the implementation of a mandatory standard would solve this problem by increasing awareness of the dangers of nonconforming beds. In addition to providing notice to both manufacturers and parents, the standard would offer civil liability as an effective deterrent to noncompliance. Indeed, the proposed regulation appears to offer an answer for every issue involved: civil liability for noncomplying manufacturers, protection for those who comply, and most important, increased risk awareness for parents and increased safety for children. It is also important to note that the regulation would be practically self-policing; complying manufacturers would not hesitate to report those who attempt to undercut their product cost, eliminating any economic advantage for the production of unsafe bunk beds.

Another argument against the mandatory standard is that the parents, not the beds, are the real problem. As pointed out in some responses to the proposed rule, most deaths involved children under the age of four. Though

flawed, this argument has some merit; in order to help reduce bunk bed-related injuries, parents and caregivers must be responsible and not allow their small children and toddlers in upper bunks. The most obvious reason for this is the danger of falling, but ironically, the guardrails that prevent such falls also create the risk of entrapment if the gap is too large between the rail and the sideboard. Warning labels informing consumers of the risk of serious harm or injury to children under six years of age would increase awareness of this potential hazard. Companies would also be required to print identification on the beds, eliminating the “mystery manufacturer” problem and allowing for more effective recall of defective beds.

The Commission’s staff estimates that approximately ten children die each year of entrapment. A mandatory standard would provide a solution to the heart of this problem- **notice**—by sending a message of urgency to the public about this tragic trend. It would educate those who are unaware of the dangers inherent in nonconforming beds- the small manufacturers, for example. Of course, if aware that certain types of beds posed a severe risk of danger to their child, parents would hopefully do whatever it took to remedy the problem; a real problem is how to reach the owners of the thousands of nonconforming beds already in circulation. The publicity generated by the new standard and fines for noncompliance would surely reach most consumers. The problem beds would then either be modified or recalled. Even in

conforming beds, however, consumers need to be aware not only of the general risk to young children, but of the risks involved when the bed is altered in any way.

I strongly disagree with attempts to classify the entrapment deaths as unfortunate tragedies that merit our compassion, but no responsive action, and comparisons to bizarre products or events that have caused a higher death rate among children than those at issue here. This particular hazard can at the very least be significantly reduced with almost embarrassing ease; why not do whatever it takes to at least minimize that number, when the biggest reasons for the deaths appear to **ignorance**—of the parent, the small manufacturer, the builder of homemade beds, etc.? Money, as crass as it would seem when discussing the value of a child, is the only plausible answer, and even it isn't persuasive.

A cost/benefit analysis also points toward promulgation of the new rule. CPSC's Economics staff determined that the modification necessary to comply with the safety standard, the addition of a second guardrail to the top bunk, would result in a \$15 to \$40 increase in costs. The only other imaginable costs involve the possible losses that might result from an age restriction requirement and the higher prices that could affect consumer sales of bunk beds. To me, these costs pale when compared to the alternative- the high likelihood that the deaths by entrapment will continue as they have in recent

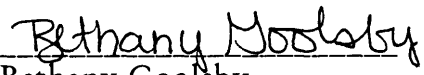
years, at an average of ten children a year. Again, according to the available data, those who would bear the additional costs would be those manufacturers who do not currently conform to the voluntary standard, as those who are in compliance would have to change very little.

However, it is true that a mandatory safety standard for bunk beds is not a “magic solution” to the hazards posed to consumers. The Commission is aware of three deaths that have occurred even in conforming beds, indicating that perhaps the voluntary standard should not be adopted exactly in its current form. Further investigation of those deaths would be necessary to determine what changes need to be made to the standard prior to its adoption. If problems are discovered after its adoption, the Commission may by rule amend or revoke it, as it can any consumer product safety rule, eliminating AFMA’s concern that a mandatory standard would result in “static” regulation of bunk beds.²

Obviously, not many people are going to be outspoken against a proposed rule designed to save the lives of children, but when deciding whether to adopt the proposed mandatory standard, the “two prong test” mentioned earlier must be considered: First, is it needed? Yes. Despite the much-touted 90% compliance with the voluntary standard, deaths continue to occur. Second, will it work? Very likely, and it can do so without placing an undue

burden on complying manufacturers. I believe it is unlikely that the voluntary standard alone will “result in the elimination or adequate reduction of the risk of injury identified in the petition,” and it is equally unlikely that there will be “substantial compliance with the standard,” as demonstrated by the consistency of deaths by entrapment. For these reasons, the proposed mandatory safety standard should be adopted.

Respectfully submitted,


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Consumer Product Safety Commission
63 FR 3280

COMMENT REGARDING THE COMMISSION'S ADVANCED NOTICE OF PROPOSED RULEMAKING
REGARDING PERFORMANCE REQUIREMENTS FOR BUNK BEDS

This comment will address the advanced notice of proposed rulemaking (ANPR), dated Tuesday, January 22, 1998. The Consumer Product Safety Commission (CPSC) has requested comments concerning its proposal to initiate rulemaking proceedings that may result in mandatory requirements for bunk beds. The CPSC based its' ANPR on the reported number of injuries/deaths that have occurred as a result of entrapment in bunk beds, the lack of industry compliance to mandatory rules and the need to fulfill its obligations to monitor the safety of consumer products.

I agree with the main goals and directives of the CPSC as it seeks to protect and inform consumers about potentially dangerous products. In addition, the CPSC has worked with various industries, including the bedding and toy manufactures industry, in hopes of reaching standards that are non-restrictive, yet preventive of harm to consumers.

In reading the information supplied in the ANPR, the CPSC is certainly correct in its continued consideration of bunk bed safety. However, I do have several concerns which include the actual issuance of the proposed mandatory requirement (which statute will the requirement fall under), the voluntary standard (has the industry done its part to correct any problems) and the omission of potential adult hazards (is there a concern within the adult population that the CPSC has failed to consider).

As noted in the ANPR, the CPSC has identified approximately 85 fatalities attributed to bunk beds, with 64% of those due to entrapment. In addition, it was noted that the areas of the beds where the deaths occurred did not comply with the voluntary industry standards. In relation to the voluntary standards, the CPSC found that over a three-year period numerous manufacturers still were not in compliance.

Issuance of a mandatory **standard** might serve to increase awareness as well as “familiarize” new manufacturers with compliance initiatives. The proposed cost benefits, as discussed in the ANPR, would be minimal at best. The argument that the industry is competitive, however, is weak as the CPSC has acknowledged that many manufactures may be in existence without their knowledge. In addition, the fact that manufacturers of bunk beds, as well as other kinds of consumer products, can easily enter and leave the market might indicate that the industry is not very competitive. Yet it is important to keep in mind that any product, if it is shoddily constructed or inherently defective, will not last long in the marketplace. Nonetheless, to the unknowing or unsuspecting consumer, waiting for the marketplace to correct itself can be risky if not life-threatening.

It is obvious that problems do exist with the present voluntary requirements and as such efforts that are more rigorous should be pursued to ensure protection from possible injury. However, what statute should hold authority for issuing such requirements and does the usage of a certain statute rule out application to a segment of the population that the CPSC may be overlooking?

The Federal Hazardous Substances Act (FHSA) authorizes the regulation of products that present, among other things, mechanical hazards to children (15 U.S.C. 1261

(f) (1) (d). **Mechanical** hazards are described as those that occur when in normal use or in subjection to reasonably foreseeable damage or abuse, the design presents an unreasonable risk of personal injury or illness from points or other protrusions, surfaces, edges, openings, or closures. There are several other definitions of mechanical hazards, however this one is most appropriate to the issue of bunk beds (15 U.S.C. 1261 (s)). The other definitions refer to issues of movement, disassembly on part of the user or characteristics of the article that make it digestible or breathable.

Manufacturers usually create bunk beds with one side open for entry. The ASTM's (American Society for Testing and Materials) voluntary standard for bunk beds requires guardrails on both sides of the top bunk and all spaces between the guardrail/bed frame and the head/foot boards on the top bunk be less than 3.5 inches.

So in the actual design of the bunk beds (their inherent nature), there are openings of some sort. The voluntary standards stipulate the width of those openings, but there are openings. Making the industry standard, or any standard, a requirement is noble. Yet, the main question to ask is if it will really solve the problem? The spaces and openings will continue to be there. I can not see how a mandatory requirement will “compel” manufacturers to comply.

Although the CPSC factored in potential costs of adding a second guardrail as minimal, if the rule were to re-calculate the widths of openings, the cost- benefits analysis would have to be refigured. Adding a second guardrail might solve the problems, but if the real issue is the space present in bunk beds that can cause entrapment- then adding a second guardrail might not resolve the CPSC's concerns.

In addition, the other definitions of “mechanical hazards” seem to lack authority in this matter. If a consumer were to disengage the guardrails or any other device associated with the bunk bed, they would increase their exposure to injury (15 U.S.C. 1261 (s) (1)). That, however, is not the fault of the manufacturer. Issues of movement, motion or stopping movement do not pertain either, as guardrails, head and foot boards are usually stationary items (15 U.S.C. 1261 (s) (2) (4) (5) (8)).

Arguments can be made about mattresses and the ease with which they can fall off a bunk bed. In spite of that, similar arguments are heard for other types of children’s bedding as well. Labeling a bunk bed as a “mechanical hazard” is problematic and under the FHSA, the proposed rule might not work

The Consumer Product Safety Act (CPSA) is an alternative to the FHSA. “Consumer product” means any article produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, or in recreation (15 U.S.C. 2052 (a) (1)). The CPSA authorizes the CPSC to regulate “unreasonable risks” that are associated with consumer products (15 U.S.C. 2052 (a) (1) (2) (3)). Bunk beds are clearly defined as a consumer product under the CPSA definition since usage is primarily, but not limited to, the home.

Regulation under the CPSA would be ideal for several reasons. First, it does not deal with the technicalities and hassles as discussed with the FHSA. If the product, under the CPSA, has unreasonable amounts of risk of injury, it can be regulated. The term “risk of injury” means a risk of death, personal injury, or serious or frequent illness (15 U.S.C. 2052 (a) (3)). From the statistics given in the ANPR and by the CPSC, bunk beds do have the “risk of injury” element.

This statute is also inclusive of everyone as it does not pertain only to children. The formation of this proposed requirement under the CPSA would eliminate future confusion concerning the applicability to certain segments of the population. While one can justify the creation of separate rules for children and for adults, bunk beds are consumer products to all that use them. However, it is highly unlikely that an adult user would perceive a bunk bed as a hazard, as an adult might be “physically” removed from some of risks that may apply to children.

Forming the requirement under the CPSA would also cover others in the population that use have uses for bunk beds, such as teen-agers, the physically challenged and prison inmates. While there has been no legal precedent in this area, bunk beds have been named as being restrictive and/or contributing factors in adult deaths as in Lancaster v. Monroe County, Alabama (United States Court of Appeals, Eleventh Circuit, No. 96-6735, July 11, 1997). Therefore, for special segments of the population such as inmates and those with physical ailments, forming a standard requirement under the CPSA might be in their best interest as well. The language of both statutes is arguably similar. However, I would urge the CPSC to consider taking the more encompassing and less ambiguous route by forming any policy concerning bunk beds under the CPSA.

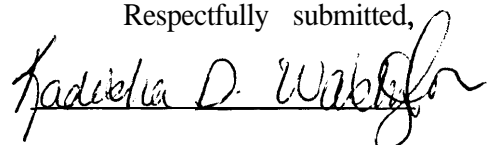
The last issue I plan to discuss is the voluntary industry standards. The CPSC is not authorized to issue a standard unless it can show that there is a lack of compliance with industry imposed standards. The ANPR states the industry has about 90% compliance with the voluntary standards. The debate centers around how substantial that compliance figure is and how compliance is actually measured. The legislative history suggests that compliance

can be measured in terms of the number of products, in this case bunk beds. Substantial compliance is measured by the timely reduction of risk through the usage of the industry standards. Given the clarification of these two concepts, it would seem feasible that the CPSC could forge ahead in its plan to construct a standard requirement. The industry's requirements have done little to reduce the number of deaths. The only time where the requirements seemed to have been effective was in 1992 when the ASTM published the Standard Safety Specification for Bunk Beds (ASTM F1427-92). That year there were only two deaths caused by bunk beds. Yet, a year later saw that figure rise to 19. So it would seem that the industry is not following its own guidelines.

Despite that fact, the record of accomplishment over the last three years does suggest a trend towards reduced deaths. The numbers in 1997 (seven deaths) are the lowest in seven years. The industry seems to be either complying more with the standards or at least recognizing the potential dangers that can occur with bunk beds. Perhaps instituting a required standard now might take the initiative away from the industry to continue with voluntary standard compliance. Further research into the reasons behind the decline might give additional insight into the matter. Moreover, the CPSC should try to correlate or at least establish more effectively the notion that the industry standard have been ineffective. Parent groups, consumer organizations and the CPSC have been vigilant and persistent in removing/recalling potential dangerous beds from the market. Understanding how such groups may have affected this issue needs to be considered as well.

I believe the CPSC concern over entrapment and general bunk bed safety is important. However, the CPSC should keep several things in mind as it prepares to make a decision. First, promulgating a rule under the Consumer Product Safety Act would be efficient and less ambiguous for consumers. Second, the formation of a standard requirement under the Consumer Product Safety Act would include not only children, but also adults who could possibly be at risk. Third, the CPSC ought to conduct further research or seek additional comments on the issue of industry standards, especially concerning the recent decline in bunk bed deaths. As stated earlier, a more concise definition of the problem would be helpful. Is the problem with the spacing of the top bunk apparatus? On the other hand, would adding a longer or an additional guardrail solve the problem? How much more responsibility and cost must the manufacturer bear? These are the issues that I challenge the CPSC to consider as it continues to maintain high standards of product quality and the safety of all consumers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kadesha D. Washington", written over a horizontal line.

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ANPR for Bunk Beds
Consumer Product Safety Commission
16 CFR Chapter II

Comment Against the Creation of a Mandatory Safety Standard for Bunk Beds

Introduction

Despite a history of safety problems, bunk beds have continued to enjoy great popularity in American households. Bunk bed manufacturers estimate that 500,000 bunk beds are sold each year for residential use — for a total of about 4,000,000 bunk beds sold from 1990-97, the period examined by the Consumer Product Safety Commission (“Commission”) in this Advance Notice of Proposed Rulemaking (“ANPR”). Within this same seven year period, 85 children died as a result of entrapment, hanging, or falls from bunk beds. Although each of these deaths is tragic, the creation of a mandatory safety standard would not guarantee an increase in the current level of bunk bed safety under the voluntary standard.

Almost twenty years ago the bunk bed industry, recognized the need for a safety standard and organized the Inter-Industry Bunk Bed Safety Task Group (“Group”) to develop such a standard. Members of the Group included the National Association of Bedding Manufacturers, the National Association of Furniture: Manufacturers, the Southern Furniture Manufacturers Association, and the National Home Furnishings Association. In 1978, the Group developed the first voluntary safety standard for residential bunk beds. This standard was included in the American National Standard for Bedding Products and Components (“and was published in the

American Furniture Manufacturer's Association's ("AFMA") bunk bed manufacturing guidelines. When portions of the voluntary standard were challenged, AFMA, in conjunction with the Commission, revised, improved, and expanded the standard to address additional safety concerns and to require additional information about the manufacturer, distributor or seller of the beds.

Since the bunk bed industry has adopted and implemented a voluntary standard to address the risks that bunk beds pose, the Commission may not create a mandatory safety standard unless the risk of injury will not be reduced by compliance with the voluntary standard or unless it is likely that the voluntary standard will not be complied with. The voluntary standard is being complied with — of the 106 major bunk bed manufacturers identified by the Commission, all are currently building products in compliance with the voluntary standard — and will reduce injury — of the 85 bunk bed related deaths, only three were caused by nonconforming beds — therefore, the Commission *may not* create a mandatory standard. The Commission *should not* create a mandatory standard because it would not address the concerns voiced by the Commission, the manufacturers, or the public — what to do with small regional manufacturers who may frequently go into and out of business, who may make faulty equipment, and who may be unaware of or unconcerned with the voluntary safety standard created by the industry.

Voluntary v. Mandator-v Rules

As stated earlier, since a voluntary standard is already in place within the bunk bed industry, the Commission may only make a mandatory rule if there is not substantial compliance with the voluntary standard. In this ANPR, the Commission says that substantial compliance

should be determined by examining “whether or not there will be sufficient compliance to eliminate or adequately reduce an unreasonable risk of injury in a timely fashion” and in general, compliance “should be measured in terms of the number of complying products rather than in terms of complying manufacturers.” H. R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 873 (198 1).

The general rule protects against those situations where a large number of small manufacturers comply with a voluntary standard even though a small number of large manufacturers refuse to comply. When it comes to the bunk bed situation, however, all of the 106 major bunk bed manufacturers identified by the Commission are building products in compliance with the voluntary standard and “[w]hile there are likely many other small regional manufacturers or importers of bunk beds in addition to the 106 identified firms, these are not likely to account for a significant share of the US market.”

The more specific test set out by the Commission requires that compliance with the voluntary standard will adequately reduce unreasonable risks in a timely manner. Sufficient compliance does not require elimination of every possible risk, it just requires a reduction “to a sufficient extent that there will no longer exist an unreasonable risk of injury.” H. R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 873 (198 1). For example, it would be unreasonable to build a bunk bed without rails, it would be unreasonable to space the railings too far apart, and it would be unreasonable to leave a gap in the upper or lower bunks where a child could become trapped. Entrapments, falls, and hangings, are the primary causes of bunk bed related injuries and deaths and the voluntary standard currently addresses each of these risks. Basically, the Commission’s **test** is designed to protect an average consumer who walks into a store, purchases and assembles a bunk bed. This consumer should feel confident that its children may safely sleep, play, and

otherwise act like ordinary children around the bunk bed without the consumer feeling any unreasonable concern for the child's safety. The voluntary standard already in place should provide this sense of security.

Alternatives to a Mandator-v Standard

The Commission and the bunk bed manufacturers seem to be concerned primarily with small regional manufacturers who (1) may undercut profits by building and selling substandard beds; (2) do not stay current with trends in the trade; (3) are not members of the trade organizations; and (4) would either ignore the voluntary standard or would refuse to comply. Although the Commission lists several ways that it believes the mandatory standard would address these issues, the fact still remains that “[b]ecause of the relative ease of constructing bunk beds, many small companies are formed each year. These may quickly go in and out of the business of making bunk beds. These companies are normally not associated with industry organizations, and are often unaware of the voluntary standard or misinterpret its requirements.” It is difficult to see how creation of a mandatory standard would suddenly cause small businesses to be more aware of a safety standard, or to be in compliance with such a standard.

I believe that the voluntary standard should be retained and revised continually to meet the ever changing needs of the industry (such as requiring manufacturer identification on all bunk beds so as to aid in recalls should they be necessary, or modifying the requirements so as to prevent the three fatalities caused by beds which were in conformance with the voluntary standard), and in addition to the voluntary standard, the Commission and the bunk bed industry should embark on an aggressive public awareness campaign.

The voluntary standard could be publicized by the news media, warning the public of the danger of non-conforming beds. Bunk bed manufacturers could also relate the standard to retailers and encourage retailers to sell only “safe” beds. Manufacturers could refuse to distribute to retailers who would not comply. Selling “safety” would have immense positive benefits both for the retailers who sell only “safe” beds, and to the manufacturers, who can place the “safe bed” label on their products -- how many parents would choose a bunk bed for their children which did not contain this “safe bed” label? Aggressive publicity of the safety standard would also serve to shrink the market for those manufacturers who refused to comply with the voluntary standard, thereby dealing more effectively with the true problem of irresponsible small regional manufacturers. The importance of publicity has already been recognized by the Commission — if a mandatory rule had been created, the Commission was ready to publicize “fines for noncompliance with a mandatory standard [so as to] deter other manufacturers from making noncomplying beds.” Publicizing the voluntary standard would also increase the awareness and sense of urgency regarding compliance with the entrapment provisions among current manufacturers, thereby increasing conformance with the voluntary rule.

In addition to publication, the Commission and the bunk bed industry could also develop a training program to help manufacturers, merchants, and inspectors identify nonconforming beds. The Commission was willing to use police and inspectors to search out nonconforming beds under a mandatory standard, why not train these people to spot beds not in compliance with the voluntary standard? Hopefully, by having a well trained, proactive retail force, nonconforming beds could be identified before they even hit the floors, protecting children from harm, and saving the time and the negative publicity of a massive recall.

The Commission has previously been supportive of these massive public relations campaigns. For example, on April 16, 1997, the Commission announced “Recall Round-Up Day,” a campaign to increase public awareness of dangerous and defective products and to encourage people to return the faulty products. Some of the state and local activities suggested by the Commission included organizing a news conference, issuing news releases, distribute printed information about the products, provide recall lists to community and homeowners’ associations, etc. 143 Cong. Rec. S255 I-01, 105th Cong., 1 st Sess. (1997); 1997 WL 122343 (Cong. Rec.).

Conclusion

A mandatory safety standard for bunk beds is neither necessary nor desirable. The bunk bed manufacturers, in conjunction with the Commission, have consistently strived to develop a voluntary standard which adequately protects persons against possible bunk bed dangers and currently all 106 major bunk bed manufacturers are in compliance with this rule. The bunk bed industry should be permitted to continue developing and policing its own safety standards -- creating a mandatory standard would just contribute another layer of bureaucracy without really eliminating any safety risks. Finally, I would urge you to consider the words of Ann Brown, Chairman of the Commission, as she describes the Commission’s role in regulating businesses:

Building on the theme of cooperation between government and business, I believe the paradigm for the Commission in the 90s is the triangle, where business, consumers, and the government, each have an equal role to play. For business, the bottom line should include a margin of safety in all its products because today safety sells. It also avoids expensive private litigation and government action against unsafe products. Correspondingly, for their own safety, consumers should be informed about the products they purchase and take reasonable care in using them.

1996 WL 76992 (FDCH). Testimony of Ann Brown, Chairman, U.S. Consumer Product Safety Commission, submitted before the VA, HUD and Independent Agencies Appropriations Subcommittee, 2/27/95, Federal Document Clearing House. The best solution is also the least expensive -- leave the voluntary standard in place, but use the media to increase public awareness and educate the consumer, then let the consumer decide which bed to buy.

Respectfully Submitted,

A handwritten signature in cursive script, reading "J. J. Breazeale". The signature is written in black ink and is positioned above the printed name and address.

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ANPR for Bunk Beds

Consumer Product Safety Commission

16 CFR Chapter II

63 FR 3280

Comment on the effect of the existence of a voluntary industry standard on the rule-making procedure concerning bunk bed safety

Introduction

This comment will address the effects of the ASTM voluntary standard on the proposed mandatory rule for bunk beds. I will limit the comment to the standards as they apply to the prevention of entrapment related incidents.

I applaud the Commission's concern for children's safety; however, the voluntary standards published and followed by the industry prohibit the Commission from issuing a mandatory standard under either the CPSA or the FHSA.

Relying on the data provided by the ANPR, the voluntary standards are adequate to protect children from the dangers of entrapment. Of the 54 deaths resulting from entrapment-related incidents from January 1990 to September 1997, 51 occurred in areas of bunk beds that, "apparently did not conform to the current voluntary standard" (see ANPR). Only three

fatalities occurred in areas that conformed to the voluntary standards. Thus, the voluntary safety standards are, “likely to result in the elimination or adequate reduction of such risk of injury” 15 U.S.C. 1262 (i)(2)(A)(i).

Second, contrary to the Commission’s assessment, there is substantial compliance as set forth in the CPSA and the FHSA to prevent the Commission from issuing a mandatory standard. Over 90% of the bunk beds made today conform with the ASTM voluntary standards designed to prevent entrapment incidents. Of the seven to nine million bunk beds available for use, only about ten per year have been associated with a fatal entrapment incident since 1990. Although it is impossible to state that even ten deaths are reasonable, it is reasonable to expect that regardless of whether safety standards are mandatory or voluntary, children (especially those under three) can be injured or killed in bunk bed accidents given the millions of bunk beds in use. Thus, the voluntary standards are substantially complied with to the extent that the risk of injuries are not unreasonable.

Voluntary Standard

According to the Consumer Product Safety Commission, a mandatory standard cannot be issued if, “(i) compliance with such a voluntary

standard is not likely to **result** in the elimination or adequate reduction of such risk of injury; or (ii) it is unlikely that there will be a substantial compliance with such voluntary standard.” see CPSA and FHSA. I will discuss each aspect of this prohibition in order.

First, the voluntary **standard** will result in an elimination or at least an adequate reduction of the risk of injury. Adequate reduction is defined in the legislative history as meaning that the risk will be reduced “to a sufficient extent that there will no longer exist an unreasonable risk of injury” H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 873 (1981). The CPSC reports that from Jan. 1990 to Sept. 1997, there have been 54 deaths resulting from bunk bed entrapment incidents. Only three deaths involved beds that conform with the voluntary standards. Any child’s death is tragic, but the voluntary standard has adequately reduced the risk of injury when one considers that only three fatal incidents have involved conforming beds since 1990.

Additionally, the AFMA has repeatedly demonstrated their willingness to amend and improve the voluntary standards. As recently as Sept. 1996, the ASTM published an updated voluntary standard that contained additional provisions requested by the CPSC staff (see ANPR). When describing the three incidents involving conforming bunk beds, the

Commission implies that the current voluntary standards do not address the causes of the deaths. The answer is not a mandatory standard. If the Commission believes the voluntary standards are inadequate, the Commission should inform the AFMA who will, as previously demonstrated, amend the voluntary standards.

Overall, the Commission recognizes that the voluntary standards are resulting in the, “elimination or adequate reduction of such risk of injury.” The relatively few entrapment incidents involving bunk beds that conform to the standards are the evidence; and when the standards need improving, the voluntary standards are improved. There is no need for a mandatory standard.

Substantial Compliance

The Commission may not issue a mandatory statute under either the CPSA or the FHSA unless, “(ii) it is unlikely that there will be substantial compliance with such voluntary **standard**”(see CPSA and FHSA).

Preliminarily, the Commission concludes that there is not substantial compliance with the ASTM standard. The Commission reaches this conclusion by determining that the remaining injuries are severe and that the population is extremely vulnerable. Although I agree that the deaths of 51 children (from supposedly non-conforming bunk beds) is

severe, I do not believe that the population is extremely vulnerable. Of the seven to nine million bunk beds available for use, only 54 **entrapment-related** fatalities occurred since January 1990, roughly 10 per year.

in the ANPR, the Commission states that possibly more than 90% of the bunk beds manufactured today comply with the voluntary standards. Yet, they do not consider this number “substantial compliance.” The legislative history suggests that “substantial compliance” is measured by “the number of complying products” H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 873 (1981). The data proves that substantial compliance of the voluntary safety standards has been met.

The Commission disagrees. They interpret the legislative history to mean that the substantial compliance is not met unless there, “no longer exist an unreasonable risk of injury.” *Id.* If this standard is correct, I still do not feel that the risk is unreasonable. Ninety-six percent of the entrapment deaths involved children under three years of age. The ANPR suggests that these incidents could have been prevented if another person had intervened. Therefore, it seems reasonable that children under three should not be on bunk beds without adult supervision. Instead of issuing a mandatory rule, perhaps the Commission and the AFMA should inform the public that bunk beds are not appropriate for small children. This

information, combined with the voluntary standards, seems like a better alternative.

Next, I believe the Commission should not analyze the cost/benefit information to determine if the risk of injury is unreasonable for substantial compliance requirements. According to the FHSA, the cost/benefit information is relevant in determining if the Commission can promulgate a regulation. see 15 U.S.C. 1262(i)(2)(8). However, the parts of the statute dealing with an existing voluntary standard are under 15 U.S.C. 1262(i)(2)(A). The two provisions that prohibit a mandatory rule do not include a cost/benefit analysis. Therefore, the cost/benefit should not be considered in determining substantial compliance. Nevertheless, If a cost/benefit is germane, the Commission should examine the cost associated with enforcing the mandatory standard, not just the cost of changing the non-conforming bunk bed designs.

Finally, the Commission suggests that substantial compliance requires close to 100% compliance. In fact, if the voluntary standard must “reduce the risk to the extent that an unreasonable risk no longer exists,” and substantial compliance means to reduce the risk, “to the point that the risk is no longer ‘unreasonable’” (H.R. Conf.), substantial compliance must be 100%. I do not think the statute requires 100%

compliance. If it did, the statute would allow the Commission to replace a voluntary standard with a mandatory standard when less than a 100% of a product failed to conform to the voluntary standard.

Thus, substantial compliance should mean just that. When over 90% of the products conform, the Commission is prohibited from issuing a mandatory standard.

Conclusion

Overall, the CPSA and the FHSA prohibit the Commission from promulgating a regulation unless they find that the current voluntary standard does not adequately reduce the risk of injury or that the industry does not substantially comply with the voluntary standard. In this case, the Commission concedes that the voluntary standard can adequately reduce the risk of entrapment injuries and that any needed amendments are adopted. Next, because over 90% of the bunk beds conform to this standard, substantial compliance is met. Therefore, a mandatory standard is not needed and is prohibited by the statutory authorities.

Respectfully submitted,



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CONSUMER PRODUCT SAFETY COMMISSION
ANPR FOR BUNK BEDS
FR DOC. 98-1457
63 FR 3280
16 CFR CHAPTER II

COMMENT REGARDING THE REQUIREMENT OF A MANDATORY RULE
MANDATING BUNK BED PERFORMANCE

In its notice of proposed rulemaking, dated Thursday, January 22, 1998, the Consumer Product Safety Commission requested comments concerning a proposed regulation that would mandate bunk bed performance requirements. Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 3280 (Jan. 21, 1998).

This comment will address the proposed mandatory requirements that would apply to manufacturers of bunk beds intended to be used in the home. I am a concerned citizen who is currently a third year law student at the University of Tennessee at Knoxville College of Law. As a young child, my sister and I slept in a set of bunk beds. My two younger brothers also slept in a set of bunk beds during their youth. I am pleased to see that bunk beds now contain guardrails! This comment reflects the findings of an independent retail inspection and indicates possible ways to alleviate the hazards currently associated with bunk beds.

I fully support a mandatory requirement for all bunk bed manufacturers who manufacture bunk beds intended for use by children. As a consumer, as an aunt, and as a prospective parent, I am concerned about the safety of products designed to be used by children.

The aim of the proposed regulation is to address the risk of entrapment and other hazards associated with bunk beds. In light of the continued reports of deaths and other incidents associated with bunk beds, and the indications that there is inadequate compliance with the current voluntary ASTM Standard, I support and encourage a mandatory rule. It is to be noted that this comment is limited in that after extensive research, I was unable to obtain a copy of the voluntary bunk bed standards as set forth in ASTM F1427-92. Therefore, I am only aware of two of the standards: (1) guardrails on each side of the top bunk and (2) all spaces between the guardrail and the bed frame, and in the head and foot boards on the top bunk, should be no wider than 3 ½ inches. All comments on the specifics of the voluntary standard will be limited to these two regulations.

In preparing to write this comment, I engaged in two independent preliminary retail inspections. I visited two retail stores that currently sell bunk beds. Both retail stores are located in Knoxville, Tennessee. One store engaged exclusively in the sell of beds {hereinafter referred to as Store A}, the other sold various types of furniture for the home {hereinafter referred to as Store B). The findings on which I will report in this comment will cover the structure of the bunk beds, the existence of warning labels on the beds, and the retail salesperson's knowledge of the current standards in the bunk bed industry.

I examined a total of nine beds during the inspection of the two retail stores. Each inspected bed differed in design(style) and/or manufacturer. Three of the inspected bunk beds were made of wood; the remaining six beds were made of metal.

Each bed had guardrails on both **sides** of the top bunk as required by the ASTM voluntary standard.

Store A showcased five different styles(designs) of bunk beds (four metal and one wood). Some of the beds displayed footboards and/or headboards, some contained detachable ladders while others contained ladders actually built into the structure of the bed. Each bed contained two guardrails. Each guardrail ran the full length of the bed or in the alternative any space between the guardrail and the bed frame, and in the head and foot boards on the top bunk, was less than 3 ½ inches.

Store B showcased four different styles of bunk beds (two wood and two metal). Store B did not display any of the five styles that Store A displayed. Each bed was manufactured by a different manufacturer and/or was designed differently from the beds in Store A. Each of these bunk beds included the two guardrails on the top bed, but over half of the beds **contained** an opening in the structure of the upper bunk that exceeded 3 ½ inches. Specifically, the two wooden bunk beds contained openings between the guardrails and the ends of the beds in the structure of the top bunks that appeared to be large enough to present entrapment hazards to children. The guardrails did not run the length of the beds on both sides. Both of the metal bunk beds were free from such potential hazards.

Warning labels were prominently displayed on five of the nine bunk beds. Of the five bunk beds in Store A, three prominently displayed warning labels, the other two did not. In Store B, the two wooden bunk beds did not prominently display warning labels. It is to be noted that the absence of a warning label could be attributed to the

retail store not affixing the label on the display model, rather than the manufacturers not providing one in the packaging of the bed.

The warning labels **contained** several warnings that could possibly enhance the safety of the beds. Among the most frequently found warnings were warnings against horseplay in the beds and warnings that children younger than a certain age should not be allowed to sleep on the top bunk. Six was the age commonly displayed. Several of the warning labels also warned that children might become entrapped in the beds yet did not state a reason for the entrapment.

The salesperson in the store that exclusively sold beds {Store A} believes that a mandatory standard already exists. He said that his retail store is careful to choose only bunk beds that are manufactured by reputable, high quality manufacturers who adhere to the regulations set out by the Government. Based on the follow-up questions that I asked of the salesperson, I came to the conclusion that he believes that the voluntary standard is mandatory. However, the salesperson did not have a copy of the voluntary standard readily available, but he said that there are twelve regulations. He further stated that he is aware that there are inferior companies in the bunk bed industry and that his store is careful not to order from such companies. I thought the latter to be an interesting comment. In fact, I believe that the stores should be held responsible for purchasing and selling bunk beds that could result in the death of innocent, young children because the retailer is in a position to prevent hazardous beds from entering the market.

There was some indication in Store A that Store B might have a copy of the

voluntary standards to which some bunk bed manufacturers are currently adhering. However, the salesperson that I was told to ask for was not working in Store B at the time that I inspected the bunk beds in Store B. To be fair to the salesperson in the second store (hereinafter referred to as Store B), she stated that she had only worked in the store seven months. She attributed the seven month time period to her lack of knowledge of the existence of bunk bed regulations. Nevertheless, I was somewhat disturbed that no one in Store B was able to comment on the safety of the bunk beds. What if I had actually been a parent, grandparent, or other caretaker interested in purchasing a set of the beds on that particular day? I do not ask this question in an attempt to criticize the retail store but to suggest that the industry should require retail stores to be knowledgeable of the **safety** issues that concern each bed that is to be sold in the store, such as which beds are better suited for children based on age and weight and other relevant concerns.

The proposed mandatory regulations will further the goal of addressing the risk(s) of entrapment and other hazards associated with bunk beds by making the standards uniform and by increasing the awareness and sense of urgency of manufacturers regarding compliance with the entrapment provisions. Further, the cooperation shown through compliance with the voluntary standard, recalls and offering of retrofit kits to reinforce beds suggests an awareness that hazards exist, a desire to remedy potential hazards, and that: leading manufacturers would not strongly oppose a mandatory standard.

Safety guidelines for voluntary use by manufacturers and retailers of bunk beds

intended for home use have been published in many forms dating back as early as the seventies. Yet, the number of bunk bed related deaths has not decreased. The problems associated with bunk bed related deaths are evident in several ways: (1) the number of deaths has not decreased, (2) the pervasiveness of the nonconforming beds that my independent retail inspection revealed, and (3) the frequency and magnitude of the voluntary recalls. These factors illustrate that manufacturers are still producing beds that are unsafe for our children. To remedy this situation and to prevent the loss of innocent lives a mandatory standard should be enacted.

Further, the estimated IO-40 dollars required to remedy the defective or non complying beds is far less than the value of anyone's life, granted a dollar value cannot be placed on a human life.

POSSIBLE WAYS TO ALLEVIATE RISKS

This comment contains three possible ways to address the risks associated with the hazards of bunk beds, The suggestions are: (1) The Bunk Bed industry could become a self-policing industry; (2) Manufacturers could be required to **affix** a warning label before the bed leaves its distribution warehouse and enters the retail market; (3) Manufacturers could be required to place the manufacturers name and the model number on the bed itself.

1. Bunk Bed Industry could become a Self-Policina Industry.

Assessing penalties and other liability to retailers who sell beds that do not

conform to the bunk bed standards is one possible way to address the risks associated with the hazards of bunk beds. In short, retailers could be required to “police” the bunk bed industry. This fine or penalty would provide a financial incentive for retailers to inspect the beds and ensure that they sell only beds that meet the mandatory requirement. If retailers refused to sell beds manufactured by companies that do not conform to the standards of the industry the companies would be forced to either comply with the standards or pay the price for noncompliance.

Research suggests that a minimum of ten dollars and a maximum of forty dollars is the amount required to bring the beds up to standard. The price of noncompliance to the manufacturers would be either to pay the amount that it would require to bring the bed up to standard or to let the beds sit in their distribution warehouses. The price of noncompliance to our children has in far too many cases been their lives,

Requiring retailers to police the industry could also serve as a useful means of addressing the companies that form and dissolve quickly often completely unaware of the standards in the industry. In as far as it relates to these companies, policing could become a solution to the serious conformance problem identified with the voluntary standard.

2. Manufacturers could be required bed leaves its distribution warehouse and enters the retail market.

During the retail inspection, I noticed that nearly half of the beds did not prominently display warning labels. The sole responsibility for attaching the

warning labels should not lie with retailers.

The manufacturers could be required to affix warning labels before the beds leave the warehouses and enter the retail market. The warning labels provided a sense of comfort for me as a consumer in that I was immediately put on notice that the bunk beds could present a hazard to a child. I was also made aware that children under a certain age should not be allowed to sleep on the top bunk.

Warnings should be affixed to every bunk bed before it is placed in the retail market. Knowledgeable persons within the bunk bed industry should develop a list of the most important warnings, assuming that a list does not already exist, to address the hazards that currently exist. Being able to view the warning label on a regular basis could serve as a useful reminder to parents and other caretakers of the hazards associated with bunk beds. The more often I see "Warning," "Do Not Enter Highly Flammable Material" or "Beware of the Dog" signs, the more often I am prompted to consciously think of the potential risk(s) or hazard(s) that the situation presents. Affixing a nonremovable warning label on bunk beds could have a similar effect. The desired effect would be to have more parents become aware that there are hazards associated with the use of bunk beds. In addition, the warning labels will provide parents with the necessary information to ensure that beds are safely used in the home.

I suspect that many parents and other caretakers are often unaware of the dangers associated with bunk beds until it is too late. Many are unaware until they have been affected through the loss of a child or involved in a near miss situation. The

horror associated with the loss of a child or the horror experienced by both the unsuspecting, trusting child and the parent by the threat of the loss of a child is a tragedy that a warning label might be able to alleviate for many families. Mandatory nonremovable warning labels prominently displayed on the beds will provide at least one additional opportunity to make families aware that there are risks associated with the use of bunk beds. The warnings should also be contained in the instructions; notwithstanding the fact that many consumers do not read instructions or the accompanying warnings. Requiring the manufacturer to prominently display the warning labels on the beds would increase the likelihood that the parents or other caretakers would be aware that warnings exist so that they can assist in preventing the tragic loss of a young life.

3. Manufacturers could be required to place the manufacturer's name and the model number on the bed itself.

Requiring that the manufacturers place the model numbers and the manufacturer's name on the bed itself would also assist in helping parents and other caretakers determine whether they in fact have purchased a defective bed. I understand that there is a market for used beds which more often than not are sold without the bed's original packaging that should have contained the manufacturer's name and model number. Further, consumers typically do not keep the packaging from every purchase so it is likely that consumers who purchase new beds will often not have ready access to the model number in the event that a recall is issued. If

consumers are not aware that the bed that they are using has been recalled or that they need to make arrangements to get one of the free retrofit kits an unnecessary and unreasonable risk is produced, one that could be remedied by simply requiring the manufacturers to attach the model number and their name to the bed.

In conclusion, I believe that the regulation should be pursued in a timely manner because children are in danger as you read this comment. In September 1997, five companies recalled a total of 16,500 bunk beds. One of these beds caused the death of a child by entrapment. The frequency of recall and tragic deaths of children suggests that a mandatory standard; would decrease the unreasonable and unnecessary risks of death by bunk bed.

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BEFORE THE CONSUMER PRODUCT SAFETY COMMISSION
63 Fed. Reg. 3280

COMMENT OF MELINDA SIMON REGARDING THE ADVANCE NOTICE OF
PROPOSED RULEMAKING FOR BUNK BEDS

Introduction

In its notice of proposed rulemaking dated January 22, 1998, the Consumer Product Safety Commission (CPSC) requested comments concerning a proposal setting forth certain mandatory bunk bed structural requirements. These requirements are intended to reduce the risk of injury or death among children from entrapment in bunk beds or between a wall and a bunk bed.’ Various voluntary standards have been implemented over the years, beginning in at least 1978 and culminating in the adoption of the most current version in September 1996. No statistics have been made available analyzing the effects of these voluntary standards on the number of deaths and injuries caused by entrapment.

It is thought that conformance with these voluntary standards has been varied. Between January 1990 and September 1997 fifty-four children under the age of fifteen died from bunk bed related entrapment.* Ninety-six percent of these children were aged three or younger.³ Thus, in mandating conformance with specific manufacturing standards, the primary purpose for this proposed rule is to reduce the continued risk of death and injury to children. In proposing this rule, three alternatives have been

¹ Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 3280 (proposed Jan. 22, 1998).

² *Id.* at 3281.

³ *Id.*

suggested: (1) mandatory standards; (2) improved voluntary standards; and (3) labeling and educational campaigns. This comment will address these alternatives and explain why improved voluntary standards, labeling requirements, and information campaigns are more critical to a child's safety than the suggested mandatory standard.

Mandatory Standard

In determining whether to promulgate a mandatory standard, the Commission “may not issue a standard under either CPSA or FHSA if industry has adopted and implemented a voluntary standard to address the risk, unless the Commission finds that” there is not a high level of compliance or compliance will not reduce the risk.⁴ Thus, the first issue which must be addressed is whether the Commission may even issue a mandatory rule when the current voluntary standards are in place. Second, “death by entrapment is not a bunk-bed hazard; it is a bed hazard.” All products may present some hazard, no matter how carefully manufactured. Although it is horrifying that a young child could die due to the manner in which a bed is constructed, it is important to determine whether the risk of death is great enough to mandate manufacturing constraints.

The Commission states that “there currently is not substantial compliance with the ASTM standard? This conclusion is reached after determining that, while many manufacturers do comply with the standards, deaths still occur from entrapment.

⁴ *Id.* at 3284.

⁵ Paul H. Rubin “*The Dangers of Overstating Safety Risks*,” Wall Street Journal, Oct. 8, 1987.

⁶ ANPR at 3284.

However, as mentioned above and which will be discussed in greater detail below, the vast majority of entrapment deaths occur among children who are too young to be placed in a bunk bed. If one considers that 96% of the deaths by entrapment occur to those aged three or younger, only two to three children who were of the proper age to sleep in a bunk bed died during a seven year period.⁷ While all children should be protected, it is virtually impossible that the risk of death associated with any product could be completely eliminated. It is certainly arguable that even a small number of entrapment deaths is substantial. However, if, given the published statistics, one considers only the number of deaths to children who should have been allowed to sleep or play on a bunk bed, the element of unreasonable risk is not met.

The second issue which must be ascertained is whether spending a great deal of money and resources in an attempt to completely eradicate the risk of death and injury from the misuse of one type of furniture is more beneficial than attempting to improve the overall safety of products in general. While the most vulnerable members of our society should be protected, the relatively low risk of death from a bunk-bed related accident may not be worth the furniture manufacturing industry spending money to remedy a low risk when funds could be better spent to remedy greater problems. In the long run, not only could mandatory regulations “‘limit the commission’s ability to apply its limited resources where the need is greatest . . . [but it could also] serve as future disincentives for both industry and the commission to [pursue] or cooperate in the development of

⁷ According to the ANPR 54 deaths were caused by entrapment between January 1990 and September 1997, and only four percent of these deaths were of children over the age of three. *Id.* at 3281.

voluntary standards which might hinder rather than spur the cause of safety.”⁸ Finally, as will later be addressed, a mandatory standard is meaningless if very young children are still allowed to sleep and play in bunk beds.

Voluntary Standard

In the ANPR, the CPSC states that there has been a “continuing pattern of nonconformance to the voluntary standard” in the bunk bed industry.⁹ However, at the time of the publication of this ANPR, all 106 manufacturers identified by the CPSC appear to have complied with the voluntary standard. While it may have taken some prodding to issue recalls of substandard bunk beds, it would appear from these current compliance figures that there would be future compliance with future voluntary standard. A voluntary standard would then make sense for several reasons.

First, as stated in the ANPR, problems could arise in mandating a rule for bunk beds marketed towards either adults or children. A voluntary standard allows the focus to remain on the most crucial problem - injury or death of children from entrapment or other structural defects. Further, coupled with labeling and educational campaigns, consumers would be better able to decide for themselves the risks they are willing to take given the style of bed they would prefer. For instance, if an older child, who is at a lesser risk of entrapment, would prefer a bed without specific guardrails, such a bed should be available if the consumer is willing to undertake a known risk. Finally, the Commission argues that small manufacturers desirous of entering the bunk-bed industry might not be

⁸ Jim Ostroff, *Business Coalition Fights CPSC Reform*, HFD - The Weekly Home Furnishings Newspaper, September 24, 1990 (quoting Jacqueline Jones-Smith).

aware of various voluntary standards. However, if a voluntary standard is coupled with labeling and an educational campaign, both manufacturers and consumers could be made better aware of the standards. Thus, if consumers are insistent upon these standards being met before they purchase a bunk bed, small companies which do not comply with the voluntary standards will be unable to remain in business.

Labeling and Education

Given their design, bunk beds are often appealing to young children. Not only are they a novel sleeping arrangement, but they are often viewed as a large toy. As children are probably more apt to play and climb on bunk beds than on a more traditional bed, it is true that children will be put at a greater risk of injury than they would from playing or sleeping on a traditional bed. The fact remains, however, that a large percentage of the children who die or are injured through entrapment in bunk bed related accidents were much too young to have been placed in bunk beds in the first place.” While stricter mandatory standards may generally protect children from injury, young children are still at risk. A labeling and an educational campaign will help to reduce this risk.

Labeling and education programs could be effective in several ways. First, proper labeling of the potential risks of bunk beds, particularly to young children, is critical. Both manufacturers and parents should be made aware that bunk beds are not designed for children under the age of five or six. Unless a virtual crib is made out of the bunk bed, it is not an appropriate place for a young child to sleep. Second, while bunk beds are

⁹ ANPR at 3282.

¹⁰ ANPR at 3281.

quite a novelty to many children, they are not a toy. Once again, proper labeling is necessary to demonstrate the risks involved and the ways in which parents can protect and monitor their children. Finally, as discussed below, an educational campaign would allow the general public to gain knowledge of the voluntary standards with which manufacturers should comply for maximum safety. The manufacturers' compliance, or lack thereof, with these standards must then be included in a warning label with the bunk bed.

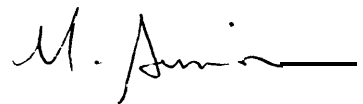
An educational campaign is crucial in order to heighten the awareness of risks to young children. This campaign should make available the voluntary standards with which manufacturers should comply. An educational campaign coupled with notice of a good voluntary standard would force manufacturers to comply with the standards which their customers had learned to expect and demand. Thus, as mentioned above, small businesses, which are interested in entering the market, would not be able to survive without a properly labeled bed demonstrating conformance with the standards suggested by the CPSC.

Conclusion

Clearly no one wants to see the death or injury of an innocent child caused by the refusal of furniture manufacturers to spend the necessary money to improve the safety of a product marketed toward children. While it does appear to be low, the risk of injury or death is something the American public certainly wants remedied. Money and resources, therefore, will need to be spent to reduce this risk of entrapment.

The true question at hand is how resources and funds should best be spent. On the whole, manufacturers currently appear to have complied with voluntary standards. Furthermore, while not adequately spelled out in the ANPR, the risk of entrapment to older children appears to be quite low. The problem appears that the greatest risk of death or injury is presented to very young children - those for whom bunk beds are not designed and to whom they should not be marketed. Thus, a campaign to educate the public and a mandatory labeling requirement would be a far more efficient and effective means of remedying the problem. If parents are educated to the risks that bunk beds pose to very young children, a combination of this knowledge and effective voluntary standards would be sufficient to reduce the risk of death. Consumers, of course, must be notified of compliance through labeling to allow for effective purchasing decisions. The combination of these elements would be as effective, or even more so, than would making mandatory a standard with no advice as to the hazards of allowing children under the age of five or six to sleep in or play on a bunk bed without parental supervision.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Simon', followed by a horizontal line.

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